MARGERY E. LIEBER
Assistant General Counsel
for Special Litigation
National Labor Relations Board
1717 Pennsylvania Ave., N.W.
Washington, D.C. 20570
Telephone: (202) 634-1729

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALAN STRANG, 8822 West Arcadia Street Milwaukee, WI 53224 Plaintiff, v. ROSEMARY M. COLLYER, General Counsel National Labor Relations Board 1717 Pennsylvania Avenue, N.W. Washington, D.C. 20570 Defendant.	Civil Action No. 87-2418 (SS)

MEMORANDUM IN SUPPORT OF THE GENERAL COUNSEL'S MOTION FOR A PROTECTIVE ORDER OR IN THE ALTERNATIVE A STAY OF THE ANSWERS TO THE FIRST AND SECOND SET OF INTERROGATORIES

STATEMENT OF FACTS

On September 1, 1987, the Plaintiff filed a Complaint with this Court for Declaratory and Injunctive Relief, pursuant to the Freedom of Information Act, as amended, 5 U.S.C. 552, (the "FOIA") seeking a Vaughn Index, release of all requested documents, and an award of costs and attorneys' fees. The Plaintiff's request to the National Labor Relations Board's Freedom of Information Officer of the Office of the General Counsel sought "all notes, documents, memoranda, reports, transcripts, correspondence and any other tangible materials relating to the General Counsel's position with regard to the Supreme Court's request that the Solicitor General state the

views of the United States concerning the petition for certiorari in CWA v. Beck, Case No. 86-637" (Exhibit "A").

On October 8, 1987, the General Counsel timely filed an Answer to the Complaint denying that the Plaintiff was entitled to access to the requested documents under 5 U.S.C. 552(a)(3) of the FOIA and denying that a Vaughn Index is required at the time a denial of a FOIA request is made by an agency. The General Counsel affirmatively asserted that all requested documents were privileged from disclosure under Exemption 5 (5 U.S.C. 552(b)(5)) and 7(A) (5 U.S.C. 552(b)(7)(A)) of the FOIA and that even if the Plaintiff should prevail, he is not entitled to attorneys' fees or other costs of litigation under the FOIA (5 U.S.C. 552(A)(4)(E)).

In the Notice of Status Conference signed by Judge Sporkin and dated October 14, 1987 (Exhibit "B"), the Court stated that all issues involving discovery were to be discussed at the status conference. On November 4, 1987, at a status conference before this Court, counsel for Plaintiff and counsel for the General Counsel stipulated that the General Counsel would provide the Plaintiff with a Vaughn Index on November 18, 1987, and that a Motion for Summary Judgment would be filed on December 18, 1987.1/ At no time prior to or during the status conference did the Plaintiff discuss his intention to seek discovery in the case

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1/ The date for the filing of the General Counsel's Motion for Summary Judgment has been extended by stipulation of the parties until January 29, 1988, with the Plaintiff's Cross-Motion for Summary Judgment due to be filed on February 29, 1988, and the General Counsel's Reply due on March 15, 1988. An amended Vaughn Index is to be filed on January 5, 1988, due to the very recent discovery by Counsel for the General Counsel of two files containing documents which may be responsive to the Plaintiff's FOIA request.

or notify the Court or Counsel for the General Counsel of such intention.

On November 12, 1987, the General Counsel received a First Set of Interrogatories (Exhibit "C"). By oral agreement, the date for answering the First Set of Interrogatories was extended to January 5, 1988.

On November 18, 1987 the General Counsel served counsel for the Plaintiff and filed with this Court a Vaughn Index.

On December 10, 1987, the General Counsel received a Second Set of Interrogatories (Exhibit "D"). Answers to the Second Set of Interrogatories are due on January 8, 1988.

ARGUMENT

I. ANSWERING THE PLAINTIFF'S INTERROGATORIES WOULD RELEASE INFORMATION REQUESTED IN THE PLAINTIFF'S FOIA REQUEST AND PROVIDE HIM WITH THE ULTIMATE RELIEF REQUESTED IN THE COMPLAINT

FOIA actions are unique in that the end result of such actions is the release to the requestor of nonprivileged documents--that is, existing government documents to which the requestor is found to be statutorily entitled. A unique problem is created by use of discovery in a FOIA action because the discovery may be used to seek the very documents or information which could ultimately be determined by the Court to be protected from disclosure. Accordingly, the courts will not allow through discovery the release of information which would give the Plaintiff the relief requested under the FOIA complaint and effectively make litigation of the complaint moot. Simmons v. Dept. of Justice, 796 F.2d 709, 711-712 (4th Cir. 1986) ("[T]he district court has the discretion to limit discovery in FOIA cases and to enter summary judgment on the basis of agency

affidavits . . . [The Plantiff's] interrogatories, moreover, appear largely to be an attempt to avoid the FOIA's exemptions and to learn the contents of the requested documents. Consequently, the district court was correct in entering summary judgment based on the FBI's affidavits and in ending further discovery.") Stern v. United States, 29 F.R. Serv.2d 1062, 1063 (D.C. MA. 1980) ("'A request for a production of documents is inappropriate in a Freedom of Information Act case which itself is premised upon a request for documents. If information encompassed by the plaintiff's FOIA request is contained in the documents he requests production of, he is not entitled to those documents under Rule 34 because to give him that information would be to accord him final relief in the case.'") (Exhibit "F"); Pollard v. FBI, 705 F.2d 1151, 1154 (9th Cir. 1983); May v. Department of Air Force, 777 F.2d 1012, 1016, n.6 (5th Cir. 1985).

In this case, a number of the questions in the First and Second sets of Interrogatories seek the exact information which is part of the Plaintiff's FOIA request. Release of this information would provide the Plaintiff with the relief requested in his complaint without an adjudication on the very issue at stake in this litigation: whether the documents and information contained in them are privileged from disclosure.

Questions 10 through 20 of the First Set of Interrogatories request information concerning the communications between the Solicitor General and the General Counsel and communications between the General Counsel and the Board about the petition for certiorari in CWA v. Beck. These questions are seeking either information which is protected by normal civil discovery

privileges2/ or information that is within the Plaintiff's FOIA request and as to which the General Counsel will claim in her Motion for Summary Judgment is privileged from disclosure under the attorney work product and deliberative process protections incorporated into Exemption 5 of the FOIA (5 U.S.C. 552(b)(5)) and is privileged from disclosure as an investigatory record compiled for law enforcement purposes, release of which would interfere with enforcement proceedings under Exemption 7(A) of the FOIA (5 U.S.C. 552(b)(7)(A)). See also, Vaughn Index submitted to this Court on November 17, 1987. The application of Exemption 5 privileges to the information sought both in the FOIA request and by these interrogatories will be fully addressed in the General Counsel's Memorandum in Support of her Motion for Summary Judgment and responded to in the Plaintiff's Cross-Motion for Summary Judgment. Accordingly, Plaintiff should not now be permitted through discovery to circumvent the normal FOIA litigation process and to deprive the Government of its right to argue its case on the merits of the claimed FOIA exemptions.

In the majority of questions in Plaintiff's Second Set of Interrogatories, the Plaintiff is also seeking information actually contained in the protected documents at issue.3/ Questions 9, 11-12, 14-25, 27-30, 33-56, 61-65, 67, 69-73 seek the names of the attorneys who prepared or edited the documents listed in the Vaughn Index, as well as the material that was

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2/ See U.S. v. Morgan, 313 U.S. 409, 422 (1940) (deliberative process); Hickman v. Taylor, 329 U.S. 495 (1947) (attorney work product).

3/ The Second Set of Interrogatories does not have a Question 26.

edited.4/ In addition, Questions 15-16, 27-29, 48-51 seek the identities of the participants attending meetings held concerning the CWA v. Beck litigation. Similarly, Questions 57-60, 66, 68-74 in the Second Set of Interrogatories seek case names and actual pages of reference material which are collected in the Board's files and which comprise protected documents listed in the Vaughn Index.

Each of these questions seek the very information contained in a document listed in the Vaughn Index and for which the General Counsel has claimed a FOIA exemption. Obviously, release of this information to the Plaintiff through discovery would provide him with much of the records which the General Counsel asserts is privileged from disclosure and which must be resolved through adjudication of the claimed FOIA exemptions. Thus, this case is exactly the type of case when this Court can and should exercise its discretion to deny the requested discovery.

A. Discovery in FOIA Litigation Is Limited and Not Appropriate in This Case

Because of the unique problems created by discovery in FOIA litigation, courts have limited discovery to a determination of whether a proper search for documents was conducted by the agency and to facts which are crucial for the requestor to determine whether a document is exempt from disclosure. Schaffer v. Kissinger, 505 F.2d 389, 391 (D.C. Cir. 1974); Giza v. Secretary of Health, Education and Welfare, 628 F.2d 748, 751 (1st Cir.

4/ To the extent that the Second Set of Interrogatories Questions 52-56, 61-62 seek clarifying information concerning the contents of specific documents, the General Counsel will provide these facts in her Amended Vaughn Index to be filed January 5, 1988.

1980); Founding Church of Scientology of Washington, D.C. v. National Security Agency, 610 F.2d 824, 833-834 (D.C. Cir. 1979); Exxon Corp. v. Federal Trade Commission, 466 F. Supp. 1088, 1092-1096 (D.D.C. 1978), aff'd, 663 F.2d 120 (D.C. Cir. 1980); Niren v. I.N.S., 103 FRD 10, 11 (D. Or. 1984).

None of the questions in the First Set of Interrogatories addresses either of these purposes. The First Set of Interrogatories was created by the Plaintiff and served on the General Counsel on November 12, 1987, prior to the service of the Vaughn Index on the Plaintiff (November 18, 1987). It is therefore plain that this set of interrogatories was neither written to question the thoroughness of the General Counsel's search for documents, nor to obtain necessary factual material omitted from a Vaughn Index not yet due or completed. In similar circumstances, this Court has previously stated: "Whether the . . . case warrants discovery is a question of fact that can only be determined after the defendants file their dispositive motion and accompanying affidavits . . . . The plaintiff can not know at this time whether discovery is necessary; he can not know whether the government's papers and affidavits will suggest an inadequate search or factual discrepancy." Murphy v. FBI, 490 F. Supp. 1134, 1136 (D.D.C. 1980). As the First Set of Interrogatories will not be necessary to the Plaintiff's litigating position in this case, the discovery should be prohibited.

This conclusion is underscored by examination of the particular questions. Questions 1 through 9 of the First Set of Interrogatories deal with the relationship between the General Counsel and the Board. These questions are seeking information

which would be relevant to the attorney-client privilege incorporated into Exemption 5 of the FOIA, 5 U.S.C. 552(b)(5). Yet, the General Counsel has not asserted this privilege as a defense to the release of any of the documents in the Vaughn Index and therefore the answers to these questions will not aid the Plaintiff in addressing the applicability of the exemptions claimed by the General Counsel.

Indeed many of the Questions in Plaintiff's First Set of Interrogatories not only fail to meet the above enunciated standards (supra p. 6), but improperly seek, through the discovery process, to expand Plaintiff's FOIA request. Thus, Questions 23, 24 and 27 of the First Set of Interrogatories demand information concerning the Plaintiff's filing of charges in Strang v. International Association of Machinists and Local 1916, Board Case No. 30-CB-2418-1. And, questions 22, 25, 26, 28 through 34 of the First Set of Interrogatories request information concerning the General Counsel's processing of complaints in unidentified cases. However, the Plaintiff's FOIA request concerns only the "General Counsel's position with regard to the Supreme Court's request that the Solicitor General state the views of the United States concerning petition for certiorari in CWA v. Beck, Case No. 86-637." As this discovery is clearly outside the scope of Plaintiff's FOIA request, it must be denied by this Court. In a FOIA discovery dispute virtually identical to the instant one, Stern v. U.S., 29 F.R. Serv.2d 1062 (D.C. Ma. 1980), the plaintiff sought the production of documents not previously requested under FOIA. The Court denied the request for the production of documents and cited the reasoning presented by the United States:

> To the extent that the plaintiff's production request does not involve documents within the scope of his FOIA request, production is objectionable because it would allow plaintiff to expand his request without going through the administrative procedures which are a prerequisite to an action for information under the [FOIA] (citation omitted). Id. at 1063-1064.

As noted above, the Second Set of Interrogatories 5/ contains many questions which simply seek information contained in the documents at issue and which has nothing to do with the thoroughness of the General Counsel's search for records. Nor is such information critical to Plaintiff in determining whether the particular document is privileged from disclosure. For instance, questions 9, 11-12, 14-30, 33-56, 61-65, and 67 seek the names of either the authors of the document or the participants at meetings held concerning the CWA v. Beck litigation. The names of these individuals are not necessary to a determination of whether a particular document is privileged from disclosure under Exemption 5 of the FOIA (5 U.S.C. 552(b)(5)) as attorney work product or a document embodying the deliberative process of the Board, or under Exemption 7(A) of the FOIA (5 U.S.C. 552(b)(7)(A)) as an investigatory record which disclosure would interfere with an enforcement proceeding. The General Counsel

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5/ Questions 1 and 2 of the Plaintiff's Second Set of Interrogatories are vague and the General Counsel is at a loss as to what information Plaintiff is seeking which he does not already possess. While questions 3 through 8 of the Second Set of Interrogatories appear to be seeking information as to the thoroughness of the search made by the agency, they, in fact, seek information beyond the scope of Plaintiff's FOIA request. See discussion supra pp. 8-9. Nevertheless, in searching for information in response to the Second Set of Interrogatories, the General Counsel has found documents similar to the "vehicle use logs" and "itineraries or calendars" requested in questions 3 through 8. The General Counsel, in her discretion, has decided to release these records, attached hereto as Exhibit E.

has provided the Plaintiff with the necessary facts (i.e. that attorneys wrote the documents, that they were created for litigation in CWA v. Beck, and the titles of the participants at any meetings) to determine whether Exemption 5 or 7(A) apply to the documents for which the Plaintiff is requesting names.6/

The same is true for Questions 57-60, 66, 68-74 in the Second Set of Interrogatories. Providing the Plaintiff with the case names or page numbers of the reference material will not aid the Plaintiff in opposing the General Counsel's claimed exemptions. It is sufficient for the Plaintiff to know that the documents responsive to these questions are legal research materials; to disclose now the case names and page numbers will provide the Plaintiff with the very records the General Counsel claims are privileged under FOIA Exemption 5 and 7(A) and will moot that part of the General Counsel's FOIA case on the merits.

Discovery sought in questions 10, 13 and 31 in the Second Set of Interrogatories should be denied for another reason. These questions ask the General Counsel to state the "facts upon which you rely in claiming" that Exemption 7(A) applies to the document in question. All "facts" upon which the Board will rely in claiming Exemption 7 protection will be provided in the Board's Amended Vaughn Index and other affidavit support to the Board's motion for summary judgment. As noted, Plaintiff has agreed that the Board's Amended Vaughn Index is to be filed January 5, 1988.

6/ Question 32 of the Second Set of Interrogatories is asking if a draft of a letter (Vaughn Index document A-25) was made final and whether it was sent. This information will not aid the Plaintiff in determining if this particular draft document in question is privileged from disclosure under the FOIA and therefore the question is inappropriate discovery in a FOIA case.

To the extent that Plaintiff wishes to look further and to examine "the thought processes of the agency in deciding to claim a particular FOIA exemption . . . [t]he latter constitutes predecisional thought processes of agency officials . . . Hence, Morgan [U.S. v. Morgan, 313 U.S. 409, 422 (1941)] and its progeny disallow discovery addressing the thought processes that lead to an exemption claim." Murphy v. FBI, 490 F. Supp. 1134, 1136 (D.D.C. 1980).

II. DISPOSITION OF THE GENERAL COUNSEL'S MOTION FOR SUMMARY JUDGMENT WILL AVOID ANY NEED FOR RESPONDING TO THE FIRST AND SECOND SET OF INTERROGATORIES

In the alternative, discovery should be stayed in this case pending disposition of the General Counsel's Motion for Summary Judgment. As will be set forth more fully in the General Counsel's memorandum in support, the General Counsel will file a motion for summary judgment on grounds that the documents requested under the FOIA are protected from disclosure under Exemptions 5 and 7(A), 5 U.S.C. 552(b)(5) and 7(A). This Court's disposition of the Board's motion will be dispositive of the issues in this case and make discovery proceedings unnecessary.

Under Rule 26(c), Federal Rules of Civil Procedure, district courts are vested with broad discretion to control and prohibit discovery where appropriate.7/ Herbert v. Lando, 441 U.S. 153, 177 (1979) ("[J]udges should not hesitate to exercise appropriate

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7/ Rule 26(c), F.R.C.P., provides, in pertinent part, that:

> Upon motion by a party . . . and for good cause shown the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including . . . 1) that the discovery not be had; 2) that the

control over the discovery process"). Such power is appropriately exercised to stay potentially unnecessary discovery where all or part of a case may be resolved upon a dispositive motion. United Presbyterian Church v. Reagan, 738 F.2d 1375, 1383 (D.C. Cir. 1984) (discovery stayed pending resolution of jurisdictional issue); Scoggins v. Air Cargo, Inc., 534 F.2d 1124, 1133 (5th Cir. 1976) (discovery stayed pending ruling on motion for summary judgment); Brennan v. Local 639, Teamsters, 494 F.2d 1092, 1100 (D.C. Cir. 1974) (same); H.L. Moore Drug Exchange, Inc. v. Smith, Kline & French Laboratories, 384 F.2d 97, 97-98 (2d Cir. 1967) (discovery stayed pending disposition of jurisdictional issue).

Where, as here, the requested discovery is not crucial to the issues to be raised in the dispositive motion, it would be unnecessary and unduly burdensome to require the Defendant to respond to the extensive interrogatories prior to a ruling on the dispositive motion.

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discovery may be had only on specified terms and conditions . . . .

CONCLUSION

For the reasons stated above, the General Counsel prays that the Court grant the General Counsel's Motion for a Protective Order, or in the alternative, for a Stay of the Answer to the First and Second Set of Interrogatories pending the disposition of the General Counsel's Motion for Summary Judgment.

Respectfully submitted,

Margery E. Lieber
Assistant General Counsel
for Special Litigation
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20570
Telephone: (202) 634-1729

and

Co-counsel: Diane Rosse
Telephone: (202) 634-1665

Dated at Washington, D.C.
this 23rd day of December, 1987.

[C:ASMEM2.DJM]

Strang v. Collyer, 710 F. Supp. 9 (D.D.C. 1989)

US District Court for the District of Columbia - 710 F. Supp. 9 (D.D.C. 1989)
March 31, 1989

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710 F. Supp. 9 (1989)

Alan P. STRANG, Plaintiff,
v.
Rosemary COLLYER, Defendant.

Civ. A. No. 87-2418.

United States District Court, District of Columbia.

March 31, 1989.

***10** Hugh L. Reilly, Nat. Right to Work Legal Defense Foundation, Inc., Springfield, Va., for plaintiff.

Margery E. Lieber, Asst. General Counsel for Sp. Litigation, N.L.R.B., Washington, D.C., and Diane Rosse, for defendant.

MEMORANDUM OPINION

SPORKIN, District Judge.

Plaintiff, Alan P. Strang, filed this claim for declaratory judgment and injunctive relief under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. Defendant, Rosemary

Collyer, is the General Counsel of the NLRB.

On October 22, 1985, in a separate proceeding, plaintiff filed an unfair labor practice charge with the National Labor Relations Board ("NLRB"). In that proceeding plaintiff alleged that defendant failed, for an unreasonable period of time, to dismiss the unfair labor practice charge or to issue the appropriate complaint.[1] Plaintiff alleges that defendant has taken positions adverse to plaintiff's unfair labor charge and that such adverse positions were taken in the case of *Communications Workers Union v. Beck,* 776 F.2d 1187 (4th Cir. 1985) *cert. granted,* 479 U.S. 1004, 107 S. Ct. 641, 93 L. Ed. 2d 698 (1987), in which the defendant stated her position in an *amicus* brief. Plaintiff contends that defendant holds conflicting positions as prosecutor under 3(d) of the National Labor Relations Act, 29 U.S.C. § 153(d), and as "counsel" making policy determinations for NLRB.

Plaintiff filed an initial request with the NLRB seeking all notes, documents, memoranda, reports, transcripts, correspondence and any other tangible materials relating to the General Counsel's position in the *amicus* brief in *CWA v. Beck*. Plaintiff contends that this information is necessary in order to determine: (1) the procedures employed in defendant's evaluation of plaintiff's NLRB action; (2) whether the dual and potentially conflicting roles of defendant may have had an adverse impact upon and caused the protracted delay in the NLRB case; and (3) whether the positions taken by defendant in plaintiff's case were accurately stated.

On March 10, 1987, NLRB denied the FOIA request. The denial was based on the agency's finding that all the documents requested were exempt from disclosure because they embody the deliberative and consultative process privilege under 5 U.S.C. § 552(b) (5). Further, the agency found that some of those same documents were also exempt as attorney work product, 5 U.S.C. § 552(b) (5), and as records ***11** compiled for law enforcement purposes, 5 U.S.C. § 552(b) (7) (A).[2]

A subsequent appeal to the Director of the Office of Appeals for the General Counsel was denied. As a result, plaintiff filed this complaint under FOIA. Plaintiff initially contended that he was unable to discern the applicability of the claimed exemptions to the records which he requested. Accordingly, he requested an index under *Vaughn v. Rosen,* 484 F.2d 820 (D.C. Cir.1973), *cert. denied,* 415 U.S. 977, 94 S. Ct. 1564, 39 L. Ed. 2d 873 (1974). Pursuant to a stipulation entered into at a November 4, 1987, status conference before this Court, defendant has produced the requested *Vaughn* Index. Plaintiff also requests that this court order defendant to permit him access to all the requested records and award plaintiff costs and reasonable attorneys' fees in this action.

This matter is now before the Court on Defendant's Motion for Summary Judgment. Plaintiff points out that he does not seek production of documents. He asks only that the *Vaughn* Index be modified to provide details of sufficient specificity to overcome the defendant's burden of demonstrating the applicability of the exemptions invoked.

Plaintiff opposes the Motion for Summary Judgment on the grounds that there are material facts in dispute. Upon review of the record in this case, I find that there are no material facts in dispute and that the *Vaughn* Index supplied is sufficiently specific to overcome the defendant's burden of demonstrating the applicability of the claimed exemptions.

DISCUSSION

The purpose of FOIA Exemption 5, which includes exemptions for both deliberative process and work product, is to facilitate "'frank discussion of legal or policy matters' in writing [which] might be inhibited if the discussion were made public." *NLRB v. Sears, Roebuck & Co.,* 421 U.S. 132, 150, 95 S. Ct. 1504, 1516, 44 L. Ed. 2d 29 (1975) (quoting S.Rep. No. 813, 89th Cong., 1st Sess. 3, p. 9 (1965)). Congress feared that if such discussions were made public, the decisions and policies formulated would be poorer as a result. In light of the purpose of the privilege, a determination should be made as to whether the information sought is one that would injure the quality of agency decisions, and therefore would fall within the scope of the privilege.

Exemption 5 The Deliberative Process Privilege

In *Paisley v. C.I.A.,* 712 F.2d 686 (D.C.Cir.1983), the Court of Appeals articulated two requirements for the Deliberative Process Privilege. The requirements are: (1) that the "documents must be `pre-decisional,' i.e. they must be generated `antecedent to the adoption of agency policy'" *id.* at 698 (quoting *Jordan v. U.S. Dep't of Justice,* 591 F.2d 753, 774 (D.C.Cir.1978)), and (2) the documents must be `deliberative' in nature, reflecting the `give and take' of the deliberative process and containing *opinions, recommendations, or advice about agency policies." Paisley,* 712 F.2d at 698 (emphasis added).

In order for a court to find a document pre-decisional, the Court must be "able to pinpoint an agency decision or policy to which the document contributed. The agency bears the burden of establishing the character of the decision, the deliberative process involved, and the role played by the documents in the course of that process." *Id.*

There are essentially three categories of materials for which the defendant has claimed the deliberative process privilege. They are: (1) drafts of the *amicus* brief, *see Vaughn* Index A1-5, 8, 11-15, 17, 27; B1-5, 8 & 9, 13, 16; (2) memoranda regarding opinions, recommendations, analyses of issues of the case, and proposed positions of the NLRB members regarding the petition for certiorari ("intra-agency memoranda"), *see, e.g., id.* A9 & 10, 16, 18, 19, 21, 26, B6, 10-11, 14; and (3) notes taken at various meetings, *see, e.g., id.* A6 & 7, 22-25, B21.

***12** Upon review of the record, I find that the drafts are pre-decisional in that they show the shaping of the Board's position regarding the petition for certiorari in the *Beck* case. In *Exxon Corporation v. Department of Energy,* this Circuit stated that "[d]raft documents, by their very nature, are typically pre-decisional and deliberative. They `reflect only the tentative view of their authors; views that might be altered or rejected upon further deliberation either by their authors or by superiors,'" 585 F. Supp. 690, 698 (D.C.1983) (quoting *Pennzoil v. Department of Energy,* 4 Energy Mgt. (CCH) 26,340, at 28,606-07, 1981 WL 1281 (D.Del.1981)). Moreover, "the disclosure of editorial judgments for example, decisions to insert or delete material or to change a draft's focus or emphasis would stifle the creative thinking and candid exchange of ideas necessary to produce good historical work." *Dudman Communications v. Dept. of Air Force,* 815 F.2d 1565, 1569 (D.C.Cir.1987). The requested drafts are exempt from disclosure because they reflect the agency's decision-making process and their disclosure would injure the quality of agency decisions.

The intra-agency memoranda contain analyses of issues and recommendations by the NLRB members regarding the position to be taken by the NLRB in the *Beck* case. These documents are pre-decisional in that they were prepared before a final position was taken by the NLRB and before a first draft of the Board's *amicus* brief was composed. The final position is stated in the *amicus* brief filed with the Supreme Court. Since these documents show the give-and-take of the deliberative process they are deliberative in nature.

These memoranda were either memoranda circulated among staff members or they were memoranda sent by the General Counsel to the Board providing views and advice regarding the position to be taken in the *Beck* case. These varying opinions were later consolidated into the official position of the Board in the *Beck* case. Given their role in the NLRB's decision making process these memoranda are exactly the type of records the deliberative process privilege was intended to protect.

Similarly, the notes taken at meetings contain an account of "the exchange of opinion between personnel in the agency," *United Supermarkets, Inc. v. NLRB,* 449 F. Supp. 407, 409 (N.D.Tex.1978), and/or "a give-and-take between the divisions of the agency aimed at

least at airing the positions within the [agency]," *Cook v. Watt,* 597 F. Supp. 545, 550 (D.Alaska 1983). Therefore, these notes fall within exemption 5 because they "reflect the agency's group thinking in the process of working out its policy." *NLRB v. Sears, Roebuck & Co.,* 421 U.S. 132, 153, 95 S. Ct. 1504, 1517, 44 L. Ed. 2d 29 (1975). These notes are a part of the deliberate process in arriving at the final position taken in the *Beck* case.

This court finds that the government has met the burden of showing that all three categories of documents for which the deliberative process privilege is claimed are pre-decisional and deliberative and, accordingly, are exempt from FOIA disclosure.

The Work Product Exemption

In *National Labor Relations Board v. Sears, Roebuck & Co.,* the Court stated that "the attorney's work product rule ... clearly applies to memoranda prepared by an attorney in contemplation of litigation which set forth the attorney's theory of the case and his litigation strategy." 421 U.S. 132, 154, 95 S. Ct. 1504, 1518, 44 L. Ed. 2d 29 (1975). In *FTC v. Grolier,* 462 U.S. 19, 103 S. Ct. 2209, 76 L. Ed. 2d 387 (1983), the Court stated that to allow disclosure of material exempt in previous litigation would give the adversary insight into the agency's general strategic and tactical approach and that such disclosures would inhibit government agencies in their creation and retention of written work product that could later be used by an unrelated opponent. Further the Supreme Court has stated that the work product privilege survives the litigation for which it was prepared. *See FTC. v. Grolier,* 462 U.S. 19, 103 S. Ct. 2209, 76 L. Ed. 2d 387 (1983).

The notes concerning the meetings are also exempt under the work product privilege. *See Cities Services Co. v. FTC,* 627 ***13** F.Supp. 827, 834 (notes taken at meetings "demonstrate a weighing and analysis of matters which might affect directly the Commission's litigation strategy in the future").

Here, the purpose of the meetings was to formulate and prepare the position of the NLRB in response to the Supreme Court's request. For these same reasons the intra-office memoranda are exempt under the work product privilege.

The defendant also claims the work product privilege for handwritten documents containing legal research. These notes show the shaping of defendant's legal theories and were developed in contemplation of litigation. Accordingly, they are exempt.

Conclusion

Upon review of the record in this case, this court concludes that there are no material facts in dispute and that the *Vaughn* Index supplied has sufficient information for this court to conclude that the materials listed are exempt.

Accordingly, an appropriate order accompanies this opinion.

ORDER

On this date, the Court issued its opinion in the above titled action. Based on the reasoning set forth in that opinion and the record in this case, it is

ORDERED that Defendant's Motion for Summary Judgment be and hereby is granted.

NOTES

[1] Under the procedure for adjudicating unfair labor practice cases, NLRB either files a complaint, or notifies the complaining party of the decision not to proceed and of his right to appeal.

[2] Defendant later withdrew exemption 7.